

**WEEKLY INFORMATION PACKET
MEMORANDUM**

To: Mayor McGrath and City Council

From: Jerry Gordon, City Attorney
Jane Brautigam, City Manager

Date: January 9, 2009

Subject: Information Update on City's Valmont Butte Property

EXECUTIVE SUMMARY:

A number of recent events have transpired with regard to the Valmont Butte property that the city owns. There has also been ongoing community concern with regard to this site and its management and potential sale. In that regard, a commitment was made in October of 2008 that a public report would be made to City Council regarding city staff's evaluation and recommendations with regard to the site. This memorandum is in response to that commitment.

As will be more fully discussed below, staff currently recommends the following:

- Current environmental issues on the site should be more fully resolved, prior to any decision making on the future disposition of the property.
- The city should continue to pursue actions already initiated with regard to the Colorado Voluntary Cleanup Program ("VCUP") and the federal Brownfields programs.
- The city should continue its pursuit of past "potentially responsible parties" or "PRPs" (i.e., "prior owners and operators") who generated or deposited or created hazardous substances at the site, seeking contributions towards the costs of site cleanup.
- The city should continue to work with its outside environmental counsel on these matters.
- The city should be sensitive to cultural resource and historic preservation issues while it owns and manages the land and should carefully consider those issues at such point as it contemplates selling the land in the future.

BACKGROUND:

The city purchased the 101 acre Valmont Butte property on September 5, 2000 for \$2,575,000. The original intent was to devote part of the site to Open Space purposes, part to the construction of a fire training facility and part to Public Work's purposes. Subsequently, city plans changed and the city entered into negotiations to sell approximately 71 of those acres. The unsold portion was to be retained for Open Space purposes.

A prospective purchaser of the 71 acres was the Trust for Public Land (TPL). The city's understanding was that TPL wanted to be an interim owner before transferring ownership to interested Indian tribes or organizations, but also wanted the ability to sell to other interested purchasers. An option agreement was entered into with TPL, which effectively precluded the city from considering other purchasers and set up a process for the city and TPL to cooperatively get an appraisal of the property. However, the option agreement expired without TPL exercising the interest.

ANALYSIS:

Environmental Challenges

The site has always presented environmental challenges. Tailings and pollutants from old mining operations are located there. As a result, cleanup and remediation issues have always been associated with the city's ownership. Both Colorado and United States regulatory agencies have jurisdiction – or potential jurisdiction – over the site.

The city has worked on an ongoing basis with the Colorado Department of Public Health and Environment ("CDPHE"), the state environmental enforcement agency. The CDPHE has worked with the city regarding compliance with covenants that, among other things, bind the city to maintain the cap on the mine tailings on the site.

In the past, the city operated upon the reasonable assumption that a satisfactory conclusion with state regulators would also satisfy the federal Environmental Protection Agency ("EPA"). The EPA receives copies of ongoing communications from CDPHE about the status of the site and the city's efforts to address the environmental issues there. At one point, the EPA came to the site for inspection and additional testing. Ultimately, the EPA found that there were no urgent issues on the site. However EPA did have certain recommendations related to final site closure.

Legal Exposure Issues

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) establishes environmental liability for the release of any hazardous substance, or in circumstances where there is a substantial threat of such a release into the environment. 42 U.S.C. § 9604(a)(1). Liability under CERCLA can extend to several classes of PRPs. Those include the current owner and operator of a facility, and any entity that owned or operated a facility at the time of the disposal of hazardous substance.

The city is the current owner of the site, so it has potential CERCLA exposure. However, the problematic hazardous materials on the site were deposited by prior owners or operators.

Recent Events

Starting in the third quarter of 2008, a city team has been working closely with outside environmental counsel, Elizabeth Temkin. Based in part upon her advice, the city has begun the process of looking at other potential responsible parties. Contact has been made with one such

party, Honeywell, the successor to Allied Chemical, which processed fluorspar at the site from 1941 to the 1970s. Most of the tailings on-site are associated with Allied's tenure. Follow-up contacts and actions will be taken.

The city has also taken the first steps toward participating in the the VCUP program. That program is administered by the CDPHE. It appears that the property meets the criteria for a VCUP and preliminary discussions with both the state regulatory agency and the EPA have been productive. Communications are ongoing.

Recently, contacts have also been made with Boulder County because work at the site will require the movement and grading of significant amounts of dirt. A County permit will have to be obtained.

Finally, the city has been exploring obtaining money from the Brownfields program. This federal program can provide grants or loans for the cleanup of land, where future use is complicated by the presence or potential presence of hazardous substances. Initial discussions with both the state and federal regulatory agencies have occurred in this regard and those discussions (and related actions) will continue.

Disposition of the Land

The city's outside legal counsel has advised against selling the property at this time. She indicates that it will be logistically easier (and potentially much less expensive) for the city to deal with the site closure issues, while it still owns the property. Completion of the VCUP process should eliminate many of the issues and uncertainties associated with the site and its future use, and enhance the property's value and the City's ability, if it chooses, to sell some or all the property.

Potential Litigation

Relevant state and federal regulatory agencies have been very positive and cooperative with regard to the city's proposed courses of action. Therefore, it is not anticipated that any enforcement actions will be brought against the city by either CDPHE or the EPA.

On the other hand, contributions from one or more PRPS at the site are also being sought. In the event that such contributions are not obtained through voluntary agreements, city initiated litigation remains a possibility on this front. For that reason, some litigation-related information and analysis may not be publicly disclosed until such information becomes public through a court process or the matter is resolved. The inappropriate release of such information could negatively impact potential city legal action.

Offsite Ecological Concerns

There is no evidence of any current off-site environmental threat based upon the condition of the land. However, as it pursues site remediation, this will continue to be a primary concern for the city. The key considerations in the city's site remediation will be to avoid any

negative off-site environmental impacts and to make sure that the site itself is safe for reasonable future use.

Cultural Resource and Historic Preservation Issues

There are portions of the site that have historical and cultural importance to members of our community. The city should continue to be sensitive about those areas as it manages the site into the future. Landmarks staff is in the process of preparing an application for a grant to fund a detailed assessment of the costs of restoration of the mine buildings.

When site based environmental issues have been resolved and the sale of the site (or a portion of the site) is again contemplated, special consideration should be given to these issues.

NEXT STEPS:

Based upon the factors outlined in this memorandum and upon the advice of the city's outside legal consultant, it appears to staff that environmental issues on the site should be more fully resolved before a decision about future disposition of the property is made.

There will be continued pursuit of outside contributors to site cleanup. Contributions toward the costs of site cleanup will be sought from past owners and operators who generated or deposited or created hazardous substances on the site.

The city will continue to be sensitive concerning cultural resource and historic preservation issues while it owns and manages the land and should carefully consider those issues at such point as it contemplates selling land at the site in the future.

Additional updates on the site status will be made in written form to council. When staff feels the need for a council decision with regard to this matter, or at any time when council desires a study session or other discussion of these matters, the Council Agenda Committee will be asked to calendar a public meeting.